

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-199

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent,

vs.

HUGH J. GUNNE,
Petitioner.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

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QUESTIONS PRESENTED

I.

WHETHER THE ADMISSION OF A DEFENSE WITNESS' PRIOR INCONSISTENT STATEMENT WHEN, ON CROSS-EXAMINATION, SHE ASSERTED THE FIFTH AMENDMENT PRIVILEGE AS TO FOUNDATIONAL QUESTIONS VIOLATED PETITIONER'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM GUARANTEED BY U.S. CONST., AM. VI?

II.

WHERE A CLAIM OF PROSECUTORIAL WITHHOLDING OF KNOWN PERJURED TESTIMONY WAS NOT RAISED IN EVERY LOWER COURT IN THE MANNER PRESENTED, IS THE DEFENDANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY U.S. CONST., AM. XIV VIOLATED?

Complaining witness Barbara Ann Kimmel testified that on April 13, 1972 she received a telephone call from her husband (p 66) informing her that he was in the Hillsdale County Jail (p 68) on an open charge of murder (p 69) in the death of one Mack Machuta (p 69). She had no funds with which to hire an attorney (p 70). Mack Machuta told her earlier that if she ever needed help to go to Dr. Gunne (p 72). She first called Dr. Gunne in May of 1972 (p 72) using the alias Linda Swanson (p 75) to borrow money for her husband's legal fees (p 77, 78). Thereafter, she made a series of telephone calls to Dr. Gunne and visited him at his Joy Road clinic (p 84). She identified defendant Dr. Hugh Gunne as the doctor she saw (p 84). She spoke of telephone calls to the doctor's office from complainant and some meetings between them (p 86). Dr. Gunne lent her \$858 at Carl's Chop House (p 95) and told her that four days were needed for him to sell stock shares to get more money (p 93). Finally, on December 20, 1972 she went to meet Dr. Gunne at Frankie's Bar (p 114). She called Dr. Gunne from the bar who said he thought the meeting was to occur at his office (p 120). She drove to that location (p 121). As she pulled into the lot, she saw the doctor at his car (p 127) and asked whether he had the papers (p 128). The doctor said they were on his desk and she and the doctor went into the clinic (p 128). In his office, the doctor pulled a gun (p 130) and called her a son of a bitch (p 131). The door was slammed shut by someone else (p 131) and she was beaten on the head with a black jack (p 132) by Hank Dombrowski (p 131). The door opened and a man whom Hank called Stanley came in (p 134, 135), grabbed her and said 'You son of a bitch on the telephone' (p 136). She identified Stanley Kulczyski (p 136). Hank taped her mouth and hands (p 137). Kulczyski displayed a gun one and a half feet long and a shoulder strap (p 138). She was dragged outside (p 138). She tore the tape off her mouth and screamed. Hank hit her with the black jack and tried to put her into the trunk of a car (p 139). The tape was replaced over her mouth (p 139), she was

placed in the trunk and the lid was closed and the car drove away (p 140). She didn't know who had gotten into the car (p 140). After 10 minutes the car stopped, Hank opened the trunk (p 141), put a small black hand gun to her right cheek and fired (p 142). She was struck by the bullet (p 143). Hank put the gun to her temple but she pushed the gun away (p 143). Hank then put the gun to her chest and fired. Again she was struck (p 143). Hank pulled the trigger two more times but the gun misfired (p 143). He shut the trunk (p 143) and the car started moving (p 145). The car stopped again, Hank opened the trunk and cut the tape from her hands and face (p 145). She was playing dead (p 147) and she was taken for dead (p 146). The trunk lid was closed (p 147). She heard a car, called out, the police arrived and freed her (p 148).

Charles Knotts testified that on December 20, 1972 he met Barbara Ann Kimmel at the Red Dog Bar and accompanied her to Frankie's Bar where he entered first and she seconds later. They sat apart from each other (p 252ff). Later, he accompanied her to the clinic on Joy Road (p 267). As the car pulled into the lot, he saw defendant Gunne whom he identified (p 273, 274). Complainant got out of the car and told the witness to give her five minutes (p 274). The doctor put his arm around complainant and they entered the clinic (p 275). The witness remained in the car 5 or 6 minutes (p 275). He got out of the car and went to the front of the clinic (p 277) and knocked on the door but there was no answer (p 280). He identified Stanley Kulczyski as a man he saw (p 283) who pulled a gun on him and called him a 'motherfucker' and fired two shots at him (p 284). The witness ran across Joy Road (p 285) and while doing so he looked back and saw Kulczyski (p 285); a second man had a long gun (p 286). The witness ran to a gas station (p 303). With people from the gas station, he returned to the clinic (p 305) and found that the cars were gone and nobody was around (p 306). The witness did not inform the police (p 306).

Police Officers Edmund Wetz (p 195) and James Collins (p 223ff) testified they were in Frankie's Bar and saw witness Knotts and the complainant enter and leave.

Edward J. Grant (p 453ff) testified to Knotts' appearance at the gas station on the night in question.

An oral surgeon (p 955ff) described the wounds to the head of complainant and resultant injuries, and a thoracic surgeon testified (p 1041) he found a bullet in the chest of complainant.

Gladys Marie Gill testified (p 963ff) that she called the police when she heard female screams coming from the trunk of the automobile. Two police officers testified (p 971ff), (p 978ff) they responded and released complainant from the trunk of the automobile.

Defendant Gunne called several character witnesses and Betty Bakewell who testified that she had worked for Dr. Gunne for 4 1/2 years (p 1139). Either she or Barbara Bowman answered the telephone in Dr. Gunne's office (p 1139, 1140). The witness said she never would have allowed an unidentified caller to speak to the doctor (p 1141). She didn't recall any telephone calls from complainant on December 20 (p 1143). She testified that a day sheet was kept on which she noted the names of all patients who came into the office (p 1144). Defendant's Exh. A were 38 day sheets covering the pertinent period of time (p 1145); no name of Linda Swanson appeared on the exhibit (p 1154). The witness, viewing the complainant in the courtroom, testified that she had never seen her in the doctor's office or elsewhere (p 1166).

Defendant Gunne testified (p 1213ff) that he had never seen defendant Kulczyski in all his life (p 1223), that he did know Hank Dombrowski (p 1228) but that he never socialized with him (p 1230) and that he knew Edward Machuta as a patient (p 1229). He testified that he had never seen complainant before the preliminary examination (p 1232). On December 20, 1972, he left his office about 9:10 or 9:15 pm (p 1244). He had not received any telephone call from anyone who identified herself as Linda Swanson (p 1244). He left his office after Betty Bakewell had left but before Barbara Bowman left (p 1267). He stopped at a party store (p 1245) and arrived home at 10:10 p.m. (p 1244). At that time his daughter, Gerri, and his son, Ted, were at home (p 1266). Dr. Gunne denied pulling a gun on complainant (p 1246) or attacking her (p 1246). He denied all the complainant's testimony (p 1262, 1263).

Defendant Gunne called Barbara Bowman (p 1482ff). She had been subpoenaed but was not available earlier when defendant Gunne presented his defense. She testified that she had never received any telephone call at the doctor's office from a Linda Swanson or any unidentified woman (p 1491). She said that she had never seen the complainant in her life (p 1496). On December 20, 1972, she saw defendant Gunne departing from the office in his car at closing time (p 1497).

Under cross-examination by the prosecutor, Barbara Bowman denied that she had made tapes of telephone conversations at defendant Gunne's office from one Linda Swanson or a strange person who sought money from defendant Gunne (p 1543, 1544); she denied that a Linda Swanson came to the doctor's office on November 22, 1972 (p 1544). She denied that she was followed into the office by a man 6 feet 2 inches in height, 250 pounds in weight who was bald and ugly (p 1545). She denied having gone to Carl's Chop House on the last Thursday in November, 1972 (p 1546). She denied she had seen the complainant there (p 1547). She denied having taped the telephone conversation which

set up the meeting at Carl's Chop House (p 1547). She denied that the following day defendant Kulczyski and Henry Dombrowski were at the doctor's office and that upon instructions from defendant Gunne she had gone to head off Dombrowski before he was seen by complainant (p 1547). She denied that on the first Friday in December, complainant was in the vicinity of defendant Gunne's office with her child (p 1550) and that later on the same day Henry Dombrowski and defendant Kulczyski were present at the office (p 1550).

The prosecutor in the jury's absence informed the court that the prosecution theorized on November 1, 1971, defendant Gunne had his wife murdered by contract killers and that complainant posed a threat to Gunne of disclosing his role in his wife's murder. He believed this was Gunne's motive in seeking to murder complainant (p 1552). The prosecutor served notice that he intended to cross-examine Barbara Bowman concerning these matters and the fact that Edward Machuta had been a go-between Gunne and the hired killers (p 1553, 1554).

Barbara Bowman was recalled to the stand in the absence of the jury and was asked by the prosecutor whether she had learned from newspapers or otherwise that the wife of Dr. Gunne had been shot and killed in her home on November 1, 1971 (p 1592). The witness declined to answer the question on the ground that the answer might tend to incriminate her (p 1592).

In the absence of the jury, Victoria Machuta testified (p 1633ff) that she was the sister of Edward (Edmund) Machuta, now deceased (p 1634), and that she made tapes of telephone conversations which she had with persons in connection with investigation into her brother's death (p 1634). She offered to make these tapes (p 1635). She was not coerced (p 1636). She used police equipment (p 1636, 1637) and as instructed, made

a tape of a telephone conversation with Barbara Bowman on December 7, 1972. Exh #1 on the Special Record was the tape of that conversation (p 1646) which she gave to Sgt. Wancha (p 1647). The tape was played to the court (p 1650).

The court ruled that the prosecutor could use the tape to impeach the testimony of Barbara Bowman but that he would be confined to impeaching only the answers which she had given while testifying (p 1739).

The prosecutor recalled Barbara Bowman after she had indicated to the court that she would claim her privilege under the 5th Amendment and asked her whether she recalled being asked certain questions concerning her relationship with Edward Machuta (p 1794). The witness refused to answer, and claimed her privilege under the 5th Amendment (p 1794). Defendants moved for a mistrial (p 1795). The prosecutor then asked the witness about her knowledge of the events surrounding the shooting of complainant (p 1799). The witness again refused to answer, claiming her privilege under the 5th Amendment (p 1799).

The defense knew about the tape recorded prior inconsistent statement of Barbara Bowman at least as early as Thursday, December 20, 1973 (Tr., 1583). They knew that Vicky Machuta was the witness authenticating the tapes from the morning of Friday, December 21, 1973, when she took the stand on a separate record to determine the admissibility of the tape (Tr., 1633). They first had an opportunity to cross-examine Vicky Machuta on the afternoon of Thursday, December 27, 1973 (Tr., 1878). Vicky was well known to the defendant because she had been his "girl" (Tr., 1650).

When the prosecutor concluded his cross-examination of Barbara Bowman, the defendant did not ask her any questions upon redirect but rested immediately

(Tr., 1800). It was not until the next morning when the prosecutor was about to begin his rebuttal that the defendant first raised a claim under the confrontation clause of the Sixth Amendment (1834). At that point the trial court offered to order the witness to testify but the defense declined (Tr., 1835).

At trial Vicky Machuta testified that some time after April 18, 1972, she talked with the Hillsdale County Prosecutor and offered to assist the investigation of her brother's death by taping conversations (Tr., 1634), that the Hillsdale Prosecutor put her in touch with Detective Inspector Mullahey of the Detroit Police to whom she offered to make tapes. He introduced her to Detective Wancha of the Dearborn Police (Tr., 1635). She later made tapes with police recording equipment as well as other recording equipment (Tr., 1637). During the fall of 1972 she had telephone conversations with Barbara Bowman (Tr., 1645) which she taped, dated, and took to Wancha (Tr., 1646). On December 7, 1972, she taped a particular conversation with Barbara Bowman (Tr., 1646), did not listen to it but gave it to Detective Wancha (Tr., 1647) at the Dearborn Police Station about the next day (Tr., 1648), and that tape was identical with the tape introduced in the proceedings (Tr., 1703).

An edited version of the tape was played to the jury (p 1876). [The transcript of the tape played to the jury appears at p 2051 of the transcript.] The conversation on the tape indicated that Barbara Bowman knew the complainant, had seen her with her child in the vicinity of Gunne's office, had seen a heavy-set bald ugly man in the office, had seen Dombrowski and defendant Kulczyski at the office that day, had attempted to head-off Dombrowski so that the complainant would not see him. She had received a telephone call from one Linda Swanson and had made an appointment for Carl's Chop House.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER WAS NOT DEPRIVED OF HIS RIGHT OF CONFRONTATION WHEN A DEFENSE WITNESS INVOKED THE PRIVILEGE AGAINST SELF-INCRIMINATION ON CROSS-EXAMINATION.

Petitioner contends that his right to confront the witnesses against him was denied when defense witness Barbara Bowman invoked the Fifth Amendment upon cross-examination by the prosecutor to questions which might have tended to reveal her prior testimony as perjured.

Initially, after the prosecutor concluded his cross-examination of Barbara Bowman, the defendant did not ask her any questions upon redirect (Tr., 1800). Instead, the defense rested immediately after the prosecutor finished with Barbara Bowman (Tr., 1800). Indeed, it was not until the following morning, after the prosecution began its rebuttal that the defense first raised the Sixth Amendment claim (Tr., 1834). Consequently, the claim has the appearance of an appellate parachute rather than a claim of substance based upon a real loss. Moreover, at the time the claim was raised, the trial court offered to order the witness to testify. The defense declined the offer (Tr., 1835).

An even greater weakness in the defendant's claim, however, is the fact that Barbara Bowman was his own witness. This fact is determinative of the issue. A defense witness' invocation of the Fifth Amendment during cross-examination when the spectre of impeachment first arises, after she has testified favorably and without hesitation on direct-examination,

and after which the defense makes no attempt at redirect, is clearly not the evil for which the right of confrontation developed as an antidote. This Court stated in California v Green, 399 US 149, 156-157; 90 S Ct 1930; 26 L Ed 2d 489 (1970), with regard to the purpose of the confrontation clause:

"The origin and development of the hearsay rules and of the Confrontation Clause have been traced by others and need not be recounted in detail here. It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. Prosecuting attorneys' would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," i.e., the witnesses against him, brought before him face to face. * * *"

The Petitioner cites Douglas v Alabama, 380 US 415; 85 S Ct 1074; 13 L Ed 2d 934 (1965) to support his claim. Douglas held a denial of the right to confrontation occurred when the prosecution presented an accomplice who was appealing his conviction from a separate trial. The prosecutor asked the accomplice to confirm or deny statements read from his confession implicating the defendant while he was invoking the Fifth Amendment. The defendant had no opportunity to cross-examine the witness in regard to the innuendo which the prosecutor had established by asking the

questions and which he had produced the witness specifically to achieve. In the instant case, on the other hand, the prosecutor sought to impeach a witness whom the defendant had produced and had examined at length with great benefit.

Petitioner also cites Bruton v United States, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), which held that a limiting instruction is not sufficient to counteract a confession of a co-defendant who invoked the Fifth Amendment which the prosecutor introduced and which implicated the defendant. Bruton is hardly applicable to the instant case, where the evidence introduced was not substantive but impeachment. Moreover, in Bruton the substantive evidence, more than being merely inculpatory, was a full confession by the co-defendant. See also People v Coates, 40 Mich App 212; 198 NW2d 837 (1972), where the Michigan Court of Appeals held it not violative of the confrontation clause to admit the prior inconsistent statement of an accomplice so long as it was impeachment rather than substantive evidence.

Petitioner contends that the prosecutor's ultimately successful effort to prove the alibi witness incredible in effect rendered the witness a prosecution witness who posed a real adverse threat to his interest. Respondent contends that such an attempted conversion ought not be tolerated. The prosecutor was faced with strong testimony by Barbara Bowman exculpating the defendant. At the same time he had her prior inconsistent statement in hand. Obviously the witness had been lying at one point and on that basis fairness required that the prosecutor be allowed to deal with her testimony. Indeed it would be patently unfair if the law were to allow a witness to take the stand, to lie, and in the face of impeachment to thwart that impeachment by merely threatening to invoke the Fifth Amendment. Consequently, the defendant, as the proponent of the witness, can be reasonably expected to absorb the ramifications of her testimony.

II.

THE DEFENDANT'S RIGHT TO DUE PROCESS, U.S. CONST., AM. XIV, WAS NOT VIOLATED BY THE PROSECUTOR'S CONDUCT; THE ISSUE IS IMPROPER IN THIS FORUM.

Respondent contends that the issue presented herein was not raised in every lower court and not in the same manner presented in the petition. The issue first appears in defendant's motion for "rehearing of the rehearing" in the Michigan Court of Appeals. The issue was not presented in defendant's brief on appeal to the Michigan Court of Appeals. Instead, defendant in his brief on appeal complained of the failure to comply with the Michigan notice-of-alibi statute in failing to disclose the existence of the taped statement. Respondent rebutted that argument, and objected to the newly asserted claim of prosecutorial suppression of knowingly perjured testimony as procedurally improper when presented in the motion for rehearing of the rehearing.

In the co-defendant's case, where the issue was timely raised, the Michigan Supreme Court remanded for a hearing concerning the allegations contained in Petitioner's Issue II. The trial court found that no withholding occurred, but instead the fact that the prosecution's chief witness may have been blackmailing the defendant was fully evident in the record. Moreover, rather than rely on knowingly perjured testimony, the prosecutor himself denigrated the credibility of the complainant on that issue:

Now, at the beginning of this trial I suggested to you that Barbara Kimmel was not likely to get high grades for Sunday School attendance or something to

that effect. I suggested to you, as I indeed do now, that she is not my client. You may think she is, but she is not my client and I don't vouch for all of the things that she says. You may well consider that as to the methods that she used in her efforts to raise money from the doctor, she was evasive when she testified here. And I wouldn't blame you because, I suppose, if one's imagination were to wander, it could be argued that she was blackmailing and she wouldn't want to make that admission here. There is nothing in the record to indicate that she was blackmailing him, but if we wanted to speculate I suppose that's a possibility that we can't very well ignore but that, ladies and gentlemen, supplies the motive for the shooting of Barbara Kimmel.

Barbara Kimmel may not be forthright when she talks about why she was doing what she was doing or how she was doing it; the important thing here, however, is was she telling the truth about what happened to her, as to where it happened, when it happened, and who did it. Now, her testimony, again is corroborated as to where and when — not entirely — you didn't have a whole streetful of witnesses to do this, but you did have Charlie, who is backed up by the guy at the gas station, Mr. Grant; you had two off-duty police officers in Frankie's Bar that is practically right next door to the doctor's office, within a half block. You got all that; you got the way that she testified about the events on the 20th of December, the black jack and the shooting

of her and, Lord knows, nobody can claim she made that part up; the woman has still got a bullet right here (indicating) and in excess of two to three hundred stitches in her head. That's real. That's brutal and it's real." (2171-2172)

Additionally, the prosecutor indicated he sent packets of Kimmel's statements raising the possibility of dishonesty on the question of blackmail, well in advance of the preliminary examinations (Evidentiary Hearing Transcript, People v Stanley Kulczyski, #72-10174, (July 9, 1975, 20). The Court of Appeals upheld the lower court's findings that no suppression occurred.

Additionally, in the instant case the defense knew about the tape's existence on Thursday, December 20, 1973 (Tr., 1583); knew that Vicky Machuta was the witness authenticating the tape from the morning of Friday, December 20, 1973, when she took the stand on the separate record to determine the admissibility of the tape (Tr., 1633); but did not have to cross-examine Vicky Machuta until the afternoon of Thursday, December 27, 1973 (Tr., 1878). Therefore, seven and one-half days actual notice of the tape and six and one-half days actual notice of Vicky Machuta preceded the time when the defense could first impeach her. Furthermore, Vicky Machuta was well known to the defendant, having been his "girl" (TR., 1650), so that preparation for possible impeachment was that much easier.

The Michigan Courts saw no reluctance to permit an evidentiary hearing when the issue posed was raised pursuant to proper procedure. The Courts found no substance to the claim presented herein.

Wherefore, Respondent herein contends that the issue raised herein does not properly present the question to this Honorable Court.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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